Supreme Court, U.S.
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In the

Supreme Court of the United States

JASON DORTON,

Petitioner,

v.

ANNA PALMER, warden, California State Prison, Solano, California, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Consistent with due process, could a two-judge panel of the Ninth Circuit have legally denied a certificate of appealability, when another two-judge panel had granted a certificate of appealability in a companion case raising ***exactly the same issues***?

2. Could a two-judge panel of the Ninth Circuit have legally denied a motion for certificate of appealability, thus finally disposing of an appeal from a district court dismissal of a *habeas corpus* petition, where 28 U.S.C. §46 and Federal Rules of Appellate Procedure 27 do not permit a Federal Court of Appeals to authorize dispositive panels of less than three judges?

3. Could a two-judge panel of the Ninth Circuit legally refuse to consider a suggestion for rehearing en banc of a decision finally disposing of an appeal, and refuse to inform the other active judges of the Ninth Circuit of the existence of the petition for rehearing en banc, where Federal Rules of Appellate Procedure 35 requires a panel of a Federal Appellate Court to consider a suggestion for rehearing en banc and transmit the suggestion for rehearing en banc to all of the active judges of the Federal Appellate Court, especially where two of the other active judges had already granted a certificate of appealability in a companion case involving ***exactly the same issues***?

4. Consistent with due process, can the fate of an appeal in the Ninth Circuit legally be determined by non-judicial, secret, and unreviewable acts by non-judicial employees of the Ninth Circuit in determining (a) how a record is processed and (b) how a motion for certificate of appealability is assigned?

LIST OF ALL PARTIES

Petitioner

JASON DORTON, an individual.

Respondents

ANNA PALMER, warden, California State Prison, Solano, California.
PEOPLE OF THE STATE OF CALIFORNIA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jason Dorton respectfully petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 25, 2003.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The orders are unpublished. A copy of the orders of the Ninth Circuit and district court are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: February 25, 2003.

2. Date of any order respecting rehearing: *Court refused to consider rehearing petition.*

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article I, Section 9. The Privilege of the Writ of *habeas corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

Fifth Amendment. No person shall be ... deprived of life, liberty, or property, without due process of law...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

United States Code

28 U.S.C. §46 Assignment of judges; panels; hearings; quorum ...
(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible

(1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or

(2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

28 U.S.C. §2244(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of (A) the date on which the judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review.

28 U.S.C. § 2253. Appeal –

(a) In a *habeas corpus* proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to

review, on appeal, by the court of appeals for the circuit in which the proceeding is held....

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

United States Supreme Court Rules

Rule 13. Review on Certiorari: Time for Petitioning: 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

Federal Rules of Appellate Procedure

Rule 1: Scope of Rules; Title (a) (1) These rules govern procedure in the United States courts of appeals.

Advisory Committee Notes, 1967 Adoption: ...Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules....

Rule 27: Motions .... (c) Power of a single judge to entertain motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding....

Circuit Advisory Committee Note to Rule 27-1

(3) Motions Acted on by Motions Panels

(c) Procedures for Disposition of Motions by the Motions Panel. All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they decide the motion....

Rule 35. Determination of Causes by The Court En Banc: (a) When hearing or rehearing en banc will be ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a party for hearing or rehearing en banc. A party may suggest the appropriateness of a hearing or rehearing en banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard

en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for suggestion of a party for hearing or rehearing en banc; suggestion does not stay mandate. If a party desires to suggest that an appeal be heard initially en banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing en banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rule 47. Local Rules by Courts of Appeals (a)(1)...A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. §2072....

Ninth Circuit General Orders

2.1. Inquiry Regarding Related Matters: The Clerk shall add to the usual letter acknowledging the docketing of an appeal an inquiry as to whether the appeal relates to any pending or previously appealed matter, and a direction that, if it does so relate, the Clerk shall be immediately advised of the identity of the related matter.

6.3. Delegation of Authority to Dispose of Motions

g. Disposition of Two and Three Judge Motions

(1) The following motions may be presented to two judges rather than the full panel if only two are participating. Any motions judge participating may vote to grant relief and so order. If all judges present agree that relief will not be granted, they shall so order:

i. request for certificate of appealability;
ii. for leave to proceed in forma pauperis in civil cases;
iii. for temporary injunctive relief pending further consideration by the panel; and
iv. for transcripts at government expense....

(3) Three judges shall participate:
i. whenever a motion results in the disposition of the case; or
ii. the panel chooses to publish its order....

12.6. Use of General Orders

These General Orders pertain primarily to the court's internal functioning and therefore do not have standing as rules of the court.

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Statement of the Case

a. Proceedings in the lower Federal Courts

Two companion cases originally involving co-defendants were filed in the United States District Court for the Northern District of California on May 15, 1998, one year and fifteen days after the California Supreme Court entered orders denying state petitions for review on the merits in both cases. One of these cases is before this court; the other case is *Phelps v. Alameda*, No. 02-15821 presently pending as an appeal in the Ninth Circuit.

The district court dismissed both cases on the grounds that they

were barred by the one year statute of limitations set forth in —. Both cases were affirmed on appeal in an unreported decision of the Ninth Circuit.

Following the unsuccessful appeals, the Ninth Circuit issued numerous published opinions holding that a decision of the California Supreme Court is not final for (a) at least 30 days after its entry, under California Rule of Court 24,[1] and (b) 90 days after its entry, under United States Supreme Court Rule 13.[2]

Dorton and Phelps then filed companion motions to reinstate their petitions for habeas corpus under Federal Rules of Civil Procedure 60(b)(6). The district court denied both motions on the grounds that the motions really constituted "successive" petitions and had been filed without authorization from the Ninth Circuit. The district court also issued denials of certificates of appealability for both Dorton and Phelps. Both Dorton and Phelps filed notices of appeal on the same date, and filed practically identical motions for certificate of appealability with the Ninth Circuit on the same date.

b. Proceedings in the Court of Appeals.

It was at that point when the two companion cases took different paths. Before being appealed for the second time, these cases had always been treated as companion cases and had been assigned

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[1] *Bunney v. Mitchell* 262 F.3d 973 (9th Cir. 2001), *Smith v. Duncan*, 274 F.3d 1245 (9th Cir. 2001), *Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002), *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002)

[2] *Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999), *Souch v. Schaivo*, 289 F.3d 616, 619 (9th Cir. 2002), *Hernandez v. Small*, 282 F.3d 1132, 1137 (9th Cir. 2002), *Tillema v. Long*, 253 F.3d 494, 498 (9th Cir. 2001), *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001), *Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002).

consecutive case numbers, no matter what court they were in. However, upon reaching the Ninth Circuit a second time, the two cases were assigned widely separated case numbers. Phelps' appeal was assigned No. 02-15821, and the present case, Dorton's appeal, was assigned No. 02-15932. The record shows that the two notices of appeal were filed moments apart and were issued consecutive receipt numbers, so it was not the case that 111 notices of appeal were somehow filed between the filing of Phelps' case and this one.

The District Court clerk, for some unknown reason, sent the identical records in both cases to the Ninth Circuit a week apart. The record in this case was sent to the Ninth Circuit on May 9, 2002 and received by the Ninth Circuit on May 13, 2002; in Phelps' case, the record was sent on May 14, 2002 and received by the Ninth Circuit on May 20, 2002.[3] Since the Ninth Circuit received Dorton's record earlier than Phelps' record, Dorton's appeal should have been assigned the lower case number, assuming the Ninth Circuit clerks assign case numbers upon receipt of the record. However, Dorton's appeal received a much higher case number. This suggests that the record in Dorton's appeal sat unprocessed in the Ninth Circuit clerk's office for a considerable period of time (long enough for 111 other appeals to be docketed) before the clerk acted on it.

On July 22, 2002, motions for certificates of appealability were filed in both Dorton's and Phelps' case.

On December 2, 2002, the Ninth Circuit, per Judges Reinhard and Sullivan, granted a certificate of appealability in Phelps' appeal and set a briefing schedule.

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[3] The San Francisco Division of the Northern District of California and the Ninth Circuit are a few blocks from each other, approximately a ten minute walk.

On December 6, 2002, Dorton's counsel sent a letter to the clerk of the Ninth Circuit pointing out that the Ninth Circuit had granted a certificate of appealability in Phelps' appeal but not Dorton's, that the issues in the two cases were the same, and that there was a "remote possibility that these two appeals may have been assigned to different staff and panels for review with possible inconsistent results occurring." This letter was filed in Dorton's case only on December 9, 2002, and inaccurately summarized

"re: no action since 8/02. [STAFFAT] [02-15932] (je)."

To anyone reading the summary but not the letter itself, it would have appeared that Dorton's counsel was simply inquiring about when the Ninth Circuit would be considering Dorton's motion for certificate of appealability.

On January 14, 2003, Dorton's counsel sent a follow-up letter to the clerk of the Ninth Circuit. The letter said that his letter of December 6, 2002 had not appeared on Dorton's PACER docket and repeated counsel's concern about inconsistent results in the two appeals. Although the second letter was sent by Dorton's counsel, it was filed in ***Phelps'*** case file but not ***Dorton's***. It was also inaccurately summarized as

"re: dkting of 02-15821 and 02-15932. [MOATT] [02-15821] (je)"

To anyone reading the summary but not the letter, the docket might have suggested that the two cases were related, but would not have disclosed the significance of this fact.

On February 25, 2003, the Ninth Circuit, per Judges Leavy and Fernandez, denied Dorton a certificate of appealability.

On March 7, 2003, someone apparently working on the Phelps

appeal finally got around to considering Dorton's counsel's January 14, 2003 letter, and issued an order construing the letter as a motion to consolidate the two appeals but denying the motion because the Ninth Circuit had denied Dorton a certificate of appealability. The order was not signed by a judge. Apparently, no one assigned to the Dorton appeal ever considered counsel's December 6, 2002 letter.

ARGUMENT

1. The Supreme Court should grant certiorari because of the importance of the issues in this case.

The underlying issue in this case is whether the right to an appeal in a *habeas corpus* case should be determined consistently. It is probably unavoidable that appeals themselves are decided differently depending upon what three-judge panel hears the case, but the right to ***pursue*** the appeal should not depend on the arbitrary actions of an assignment clerk. This Court has tried to guarantee this by fashioning a rule that the Court of Appeals must grant a certificate of appealability if reasonable jurists would find the issues debatable. See *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)

Chance events have lead to a test case of whether the Court of Appeals for the Ninth Circuit really follows this Court's rule. Two companion appeals were filed that presented precisely the same issue – whether a dismissal for untimeliness under the one year statute of limitations was a "decision on the merits" rendering any later petition successive. Apparently because a file clerk misplaced the record in this case for a few weeks, the motions for certificates of appealability were assigned to two different motions panels. The first panel granted a certificate of appealability. If the Ninth Circuit really followed the "debatable by reasonable jurists" rule of *Barefoot v. Estelle*, the second panel would have granted a certificate of appealability, since

reasonable jurists – fellow judges of the Ninth Circuit – had found identical issues debatable in the companion case. But the second panel denied a certificate of appealability.

If panels of the Ninth Circuit decline to follow the *Barefoot* rule in appeals in which their failure is obvious, it is likely that they are also not following the *Barefoot* rule in other appeals as well. Moreover, as is discussed below, the Ninth Circuit has set up its internal procedures to make this kind of result much more likely.

This Court's workload precludes it from correcting these errors in every case in which they occur. But here, where the failure to follow *Barefoot* is obvious, undeniable, and apparently willful, this Court should accept certiorari.

2. Reasonable jurists could find the issues debatable in the underlying appeal because they already had done so.

The issue in the underlying appeal is whether a dismissal of a habeas corpus petition for alleged untimeliness under 28 U.S.C. §2244(d)(1) operates as an adjudication of the merits within the meaning of *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 1 48 (1963), so as to render a later attempt to reopen the case a "successive petition." *Sanders* held that for an earlier decision to be an "adjudication on the merits", each claim presented in the later petition had to have been "previously fully considered and decided against" the petitioner. *Id.* at p. 9, citing *Salinger v. Loisel*, 265 U.S. 224, 231-232, 44 S.Ct. 519, 68 L.Ed. 989 (1924). *Sanders* was reaffirmed by this Court in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000).

In the companion appeal, *Phelps v. Alameda*, the Ninth Circuit held that reasonable jurists could find this issue debatable. This decision was undoubtedly correct since, in entering its previous

dismissal, the district court only ruled that the petitions were "untimely" and never discussed any of the underlying issues. It would be difficult under such circumstances to find that the district court "fully considered" the underlying issues in the petitions.

In *Lozada v. Deeds*, 498 U.S. 430, 431, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991) (per curiam), this Court, in construing the previous certificate of probable cause requirement, held that, even if a question may be well-settled in a particular circuit, the petitioner meets the modest standard where another circuit has reached a conflicting view. See *Lambright v. Stewart*, 220 F.3d 1022, 1025-1026 (9th Cir. 2000), citing *Lozada v. Deeds*. The Ninth Circuit has no "well-settled" rule on whether a dismissal of a habeas corpus petition for untimeliness is an adjudication on the merits for purposes of the successive petition doctrine. Indeed, it has never addressed the issue in a published opinion. The Second Circuit has addressed the issue, however, ruling that a dismissal for untimeliness is ***not*** an adjudication on the merits and does ***not*** render a later petition successive. *Muniz v. United States*, 236 F.3d 122, 127 (2nd Cir.2001). *Muniz* was cited with approval by the Ninth Circuit in *Hill v. State of Alaska*, 297 F.3d 895, 898 (9th Cir. 2002), although not on the precise issue raised in this petition. Under *Lozada v. Deeds*, the Ninth Circuit panel should have granted a certificate of appealability in this case, more so because it had no conflicting well-settled rule, even more so because another panel of the Ninth Circuit had already granted a certificate of appealability in the companion *Phelps* case involving identical issues.

3. The inconsistent results were arbitrary and violated petitioner's right to due process of law.

It is unavoidable that appeals will be decided differently, depending upon what three-judge panel of a Federal appellate court it is assigned to. But the right to pursue an appeal should not depend upon accident or caprice. This is reflected in this Court's policy set

forth in *Barefoot v. Estelle* and *Slack v. McDaniel,* in which this Court has required members of a panel deciding a motion for certificate of appealability to consider the views of all reasonable jurists rather than just their own.

Here, two companion cases with identical issues were appealed at the same time. They should have been treated as companion cases in the Court of Appeals. If they had, both motions for certificates of appealability would have been assigned to the first panel and certificates would have been granted in both. But they were not. Why? Because of some rational decision not to, by a judge or at least a motions attorney? Apparently not. The inconsistent decisions below – granting a certificate of appealability in Phelps' appeal, denying a certificate of appealability in Dorton's appeal with identical issues, occurred in part because a clerk simply failed to assign a case number to Dorton's appeal for a period of at least several weeks. and allowed the two appeals to be separated and assigned to different panels for consideration. When, as provided in the Ninth Circuit's General Order 2.1, Dorton's counsel advised the Clerk that the two appeals raised identical issues and should be considered together, the court ignored the letters for months and didn't even file counsel's second letter in Dorton's case. Indeed, the court waited four months, until ***after*** the second panel had denied Dorton's certificate of appealabilty, before considering whether the two appeals were related and should be heard together. By acting arbitrarily, the Court prevented the two appeals from being considered together and judged by the same standards. Such arbitrary action violated petitioner's right to due process of law.

4. The Ninth Circuit's procedures, besides violating federal law and the Federal Rules of Appellate Procedure, made it more likely that this sort of arbitrary, inconsistent result would occur.

a. Introduction

The Ninth Circuit's procedures for considering habeas corpus appeals make it more likely that errors will occur. They go well beyond federal law, which simply requires a habeas appellant to obtain a certificate of appealability. The Ninth Circuit allows a two judge motions panel to finally dispose of a habeas corpus appeal by denying a certificate of appealabilty. It is the only area of the law in which a two judge panel can finally dispose of an appeal. The Ninth Circuit also bars any rehearing or rehearing en banc. In this case, this ensured that the two judge panel that granted a certificate of appealability in the Phelps appeal would never learn that another two judge panel had ignored their views and relegated them to the netherworld of "unreasonable jurists"

b. The denial of the motion for certificate of appealability by a two judge panel violated federal statutory law, the Federal Rules of Appellate Procedure,and the Ninth Circuit's local rules.

28 U.S.C. §46(b) allows for panels of less than all the members of a Court of Appeals for "determination of cases and controversies." Each panel must consist

> "of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."

28 U.S.C. §46(b). 28 U.S.C. §46 does not permit a Federal Court of

Appeals to authorize dispositive panels of less than three judges.

The Federal Rules of Appellate Procedure are promulgated by the United States Supreme Court as "an integrated set of rules to be followed in appeals to the courts of appeals." Rule 47 allows the individual circuits to promulgate local rules of practice "not inconsistent with" the Federal Rules of Civil Procedure. Advisory Committee Notes to FRAP Rule 1.

FRAP 27(c) and section (1) of the Advisory Committee Notes to Circuit Rule 27-1 provides that a single judge cannot dismiss or otherwise effectively determine an appeal. Section 2(b) of the Advisory Committee Notes to Circuit Rule 27-1 provides that the motions panel is composed of ***three judges***, just like a panel that hears a case on its merits. Section 2(c) of the Advisory Committee Notes to Circuit Rule 27-1 provides that all three judges of the motions panel must rule on motions that are dispositive of an appeal. Two judges may only act if the motion is not dispositive of an appeal.

No statute, provision of the Federal Rules of Appellate Procedure, or even any of the Ninth Circuit's local rules allow a dispositive motion to be decided by less than a three judge panel. Obviously, a denial of certificate of appealability in a *habeas corpus* appeal is dispositive of the appeal since it terminates the appellate proceedings. The sole authority for allowing a two judge panel to deny applications for certificates of appealability is found in General Order 6.3(g)(1), an *unpromulgated* local rule. This rule puts a dispositive denial of a certificate of appealability in the same class with such minor matters as leave to proceed *in forma pauperis* in civil cases, temporary injunctive relief, and transcripts at government expense. This General Order (which apparently was not even voted upon by the judges of the Ninth Circuit, but merely issued by the office of the chief judge) trivializes appeals of denials of *habeas corpus* petitions and makes a mockery of 28 U.S.C. §46.

In a case decided under the previous *habeas corpus* statutes, the Ninth Circuit has implied that only a three-judge panel can limit the number of issues in a certificate of appealability. *Van Pilon v. Reed*, 799 F.2d 1332 at 1335 (9th Cir. 1986)(any limitation of issues in a certificate of probable cause "is not jurisdictional and it authoritatively limits issues only when acted upon by a panel of three circuit judges." *Id.*, citing *Vicaretti v. Henderson*, 645 F.2d 100, 102 (2nd Cir.1980), cert. denied, 454 U.S. 868, 102 S.Ct. 334, 70 L.Ed.2d 171 (1981).) *Van Pilon* continues to be cited with approval, see *Lambright v. Stewart*, 220 F.3d 1022, 1025-1026 (9th Cir.2000).

The certificate of appealability procedure is abbreviated and often results in the sort of denials without reasons that the Ninth Circuit issued in this case. It is a poor substitute for an appeal that is made worse when only a two judge panel is assigned. Use of two judge panels is particularly pernicious for certificates of appealability because the standard for granting such a motion is a showing of a "substantial denial of a constitutional right" *Lowell v. Prunty*, 91 F.3d 1358 (9th Cir. 1996), which simply requires a showing that "a reasonable jurist could rule in his favor" on a constitutional claim. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 338, 77 L.Ed.2d 1090 (1983), accord, *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The third judge might have been the reasonable jurist that disagreed with the other two. After all, two other judges of the Ninth Circuit had already done so in the Phelps appeal.

c. Refusing to consider the petition for rehearing and suggestion for rehearing en banc violated 28 U.S.C. §46(c)

In the *Western Pacific Railroad Case*, 345 U.S. 247, 73 S.Ct. 656, 666, 97 L.Ed. 986 (1953), this Court construed 28 U.S.C. §46(c), which provided for rehearings of dispositive appellate court decisions by the Court of Appeals sitting *en banc*. This Court held that section 46(c) did not require the Court of Appeals to adopt any particular

procedure, but whatever procedure is adopted, the procedure "should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing en banc, that his case is an appropriate one for the exercise of the power." 345 U.S. at 268. The *Western Pacific Railroad Case* reversed a decision of the Ninth Circuit in which the panel struck a request for rehearing en banc and would not consider it at all.

This decision caused a change in the Federal Rules of Appellate Procedure, resulting in Rule 35. Under Rule 35, the clerk transmits any suggestion for a rehearing en banc to the members of the panel and the judges of the court who are in regular active service. One of those judges may then request a vote on the party's suggestion.

The procedures followed by the Ninth Circuit in this case directly contradicted the *Western Pacific Railroad Case.* The panel did exactly what this Court had condemned in that case – it struck the suggestion for rehearing en banc and would not permit the rest of the court to learn that petitioner had made the suggestion. Here, had the normal Rule 35 procedures been followed, the rest of the Ninth Circuit would have learned that the two companion appeals had been treated inconsistently and that the second panel had ignored the first panel's decision to grant a certificate of appealability. Since the issues in both appeals were exactly the same, it is highly probable that the Ninth Circuit would have granted a certificate of appealability in this case.

Conclusion

The Ninth Circuit's unauthorized General Orders guarantee that the result below will repeatedly occur unless this Court addresses the problem directly. For the reasons given above, this court should grant certiorari.

Dated: Oakland, California, Tuesday, October 21, 2003.

Paul McCarthy
Attorney for Petitioner

APPENDIX 1

FILED
FEB 25 2003
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

MINUTE BOOK COPY
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON DORTON,
Petitioner-Appellant,
v.
ANNA PALMER, Warden,
Respondent-Appellee.

No. 02-15932
D.C. No. CV-98-02003-MMC
Northern California
(San Francisco)

ORDER

Before: LEAVY and FERNANDEZ, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. 2253(cX2). All pending motions are denied. If petitioner wishes to file: a second or successive 28 U.S.C. § 2254 petition in the district court, petitioner must first move this court for an order authorizing the district court to consider that petition. See 28 U.S.C. § 2244(b)(3). If petitioner files an application in. this court for the authorization order, petitioner must show that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the

exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The Clerk shall serve on petitioner with this order a copy of the unofficial form successive petition request.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

APPENDIX 2

FILED
DEC 2 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,
Petitioner-Appellant,
v.

EDWARD ALAMEDA, Warden, Duel Vocational Institution, Tracy, California, et al.,

Respondents-Appellees.

No. 02-15932
D.C. No. CV-98-02002-MMC Northern California (San Francisco)

ORDER

Before: REINHARDT and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the district court erred in construing petitioner's motion to reinstate his 28 U.S.C. § 2254 petition pursuant to Fed. R. Civ. Proc. 60(b)(5) as a successive application under 28 BASIC. § 2244(b). See 28 BASIC. § 2253(c)(3).

The briefing schedule is set as follows: Appellant's opening brief is due January 21, 2003; appellee's answering brief is due February 24, 2003; and the optional reply brief is due within 14 days after service of the answering brief.

FILED
APR 29 2002
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON DORTON,	No. C 98-2003 MMC
Petitioner,	ORDER DENYING
v.	PETITIONER'S APPLICATION FOR CERTIFICATE OF
ANNA PALMER,	APPEALABILITY
Respondent	(Docket No. 33)

Before the Court is petitioners Application for Certificate of Appealability pursuant to 28 U.S.C. § 2253. A petitioner is entitled to a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Petitioner has filed a notice of appeal from the Court's denial of his motion to reinstate his habeas corpus petition, which had been dismissed as untimely. Petitioners motion, filed after the Ninth Circuit's affirmance of the judgment of dismissal, was based on a change in law concerning the statute of limitations. This Court denied the motion based on settled Ninth Circuit law that "a change in the

applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment" under Rule 60(b)(5). See Tomlin v. McDaniel, 865 F. 2d 209, 210 (9" Cir. 1988); see also Clifton v. Attorney General of the State of California, 997 F. 2d 660, 665 (9th Cir. 1993) (applying Tomlin in habeas corpus proceeding). Petitioner's argument that the change in the law at issue is not as "real" or as "substantive" as the changes discussed in Tomlin and Clifton is unpersuasive. Under the circumstances, petitioner has failed to make a substantial showing of the denial of a constitutional right and, accordingly, petitioners application for a certificate of appealability is hereby DENIED. This order terminates Docket No. 33.

IT IS SO ORDERED.

Dated: APR 2 9 2002

MAXINE M. CHESNEY
United States District Judge

FILED
APR 29 2002
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN PHELPS,	No. C 98-2002 MMC
Petitioner,	ORDER DENYING PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY
v.	
EDWARD ALAMEDA,	
Respondent.	(Docket No. 34)

Before the Court is petitioner's Application for Certificate of Appealability pursuant to 28 U.S.C. § 2253. A petitioner is entitled to a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Petitioner has filed a notice of appeal from the Court's denial of his motion to reinstate his habeas corpus petition, which had been dismissed as untimely. Petitioner's motion, filed after the Ninth Circuit's affirmance of the judgment of dismissal, was based on a change in law concerning the statute of limitations. This Court denied the motion based on settled Ninth Circuit law that "a change in the

applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment" under Rule 60(b)(5). See Tomlin v. McDaniel, 865 F. 2d 209, 210 (9th Cir. 1988); see also Clifton v Attorney General of the State of California (applying Tomlin in habeas corpus proceeding). Petitioner's argument that the change in the law at issue is not as "real" or as "substantive" as the changes discussed in Tomlin and Clifton is unpersuasive. Under the circumstances, petitioner has failed to make a substantial showing of the denial of a constitutional right and, accordingly, petitioner's application for a certificate of appealability is hereby DENIED.

This order terminates Docket No. 34.

IT IS SO ORDERED.
Dated: APR 2 9 2002

Maxine M. CHESNEY
United States District Judge

FILED
MAR 26 2002
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON DORTON,

Petitioner,

v.

ANNA PALMER,
Respondent.

No. C 98-2003 MMC

ORDER DENYING PETITIONER'S MOTION TO REINSTATE; VACATING HEARING

(Docket No. 28)

Before the Court is petitioner's Motion to Reinstate Habeas Corpus Petition, filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. Respondent has filed opposition, to which petitioner has replied. Having reviewed the papers submitted, the Court deems the motion appropriate for decision on the papers, VACATES the hearing scheduled for April 5, 2002, and rules as follows.

On May 15, 1998, petitioner instituted the instant action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 28, 1998, the Court dismissed the petition as untimely. On March 29, 2000, the Ninth Circuit affirmed.

Petitioner now seeks to reinstate his petition on the ground that, subsequent to the Ninth Circuit's affirmance of the Court's dismissal

of his petition, there has been a change in the applicable law that would render his petition timely. Assuming, arguendo that the subsequent cases upon which petitioner relies have changed the applicable law,' the Ninth Circuit has held that "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment" under Rule 60(b)(5). See Tomlin v. McDaniel, 865 F. 2d 209, 210 (9th Cir. 1988); see also Clifton v. Attorney General of the State of California, 997 F. 2d 660, 665 (9th Cir. 1993) (applying Tomlin holding in habeas corpus proceeding). Consequently, petitioner is not entitled to relief under Rule 60(b)(5).

Rather, the Ninth Circuit has held that where a habeas corpus petitioner files a motion for relief from a final judgment under Rule 60(b), based on a subsequent change in law, the motion should be construed as a successive application for a writ of habeas corpus. age Thompson v. Calderon, 151 F. 3d 918, 921 (9th Cir. 1998) (citing Clark v. Lewis, 1 F. 3d 814 (9th Cir. 1993)). At this juncture, however, this Court lacks subject matter jurisdiction to determine whether the change in the law would entitle petitioner to relief. Instead, petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the [successive] application." See 28 U.S.C. 2244(b)(3)(A); see also Nunez v. United States, 96 F. 3d 990, 991 (7th Cir. 1996) (holding "prior-approval device" of § 2244 "is an allocation of subject-matter jurisdiction to the court of appeals").

Accordingly, petitioners motion to reinstate is hereby DENIED. This order terminates Docket No. 28.

IT IS SO ORDERED
DATED: Mar 26 2002

MAXINE M. CHESNEY
United States District Judge

FILED
MAR 26 2002
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEDA,

Respondent.

No. C 98-2003 MMC

ORDER DENYING PETITIONER'S MOTION TO REINSTATE; VACATING HEARING

(Docket No. 28)

Before the Court is petitioner's Motion to Reinstate Habeas Corpus Petition, filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. Respondent has filed opposition, to which petitioner has replied. Having reviewed the papers submitted, the Court deems the motion appropriate for decision on the papers, VACATES the hearing scheduled for April 5, 2002, and rules as follows.

On May 15, 1998, petitioner instituted the instant action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 28, 1998, the Court dismissed the petition as untimely. On March 29, 2000, the Ninth Circuit affirmed.

Petitioner now seeks to reinstate his petition on the ground that, subsequent to the Ninth Circuit's affirmance of the Court's dismissal

of his petition, there has been a change in the applicable law that would render his petition timely. Assuming, arguendo that the subsequent cases upon which petitioner relies have changed the applicable law,' the Ninth Circuit has held that "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment" under Rule 60(b)(5). See Tomlin v. McDaniel, 865 F. 2d 209, 210 (9th Cir. 1988); see also Clifton v. Attorney General of the State of California, 997 F. 2d 660, 665 (9th Cir. 1993) (applying Tomlin holding in habeas corpus proceeding). Consequently, petitioner is not entitled to relief under Rule 60(b)(5).

Rather, the Ninth Circuit has held that where a habeas corpus petitioner files a motion for relief from a final judgment under Rule 60(b), based on a subsequent change in law, the motion should be construed as a successive application for a writ of habeas corpus. age Thompson v. Calderon, 151 F. 3d 918, 921 (9th Cir. 1998) (citing Clark v. Lewis, 1 F. 3d 814 (9th Cir. 1993)). At this juncture, however, this Court lacks subject matter jurisdiction to determine whether the change in the law would entitle petitioner to relief. Instead, petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the [successive] application." See 28 U.S.C. 2244(b)(3)(A); see also Nunez v. United States, 96 F. 3d 990, 991 (7th Cir. 1996) (holding "prior-approval device" of § 2244 "is an allocation of subject-matter jurisdiction to the court of appeals").

Accordingly, petitioners motion to reinstate is hereby DENIED. This order terminates Docket No. 28.

IT IS SO ORDERED
DATED: Mar 26 2002

MAXINE M. CHESNEY
United States District Judge

APPENDIX 7

US Court of Appeals for the Ninth Circuit
Case Summary

Court of Appeals Docket #: 02-15932 Filed: 5/13/02
Nsuit: 2530 Habeas Corpus(USpl)
Dorton v. Palmer
Appeal from: Northern District of California (San Francisco)

Lower court information:
District: 0971-3 : CV-98-02003-MMC
presiding judge: Maxine M. Chesney, District Judge

5/13/02 Filed request for a certificate of appealability. Date COA denied in DC: 4/29/02 Record on Appeal included (y/n): yes (STAFFATT) (af)

5/13/02 Received ORIGINAL District Court case file in two volumes. (STAFF) (af)

7/22/02 Filed Appellant Jason Dorton's motion for certificate of appealability; served on 7/22/02 (STAFF) [4486477] [02-15932] (ba)

8/27/02 Received Appellant Jason Dorton's supplementary memorandum of points and authorities in support of motion for certificate of appealability; served on 8/21/02 [4486477-1] (STAFF) [02-15932] (ba)

12/9/02 Received Paul McCarthy for Appellant Jason Dorton letter dated 12/06/02 re: no action since 8/02. [STAFFAT] [02-15932] (je)

2/25/03 Order filed: The request for a certificate of appealability is denied. All pending motions are denied. [4486477-1] If petitioner wishes to file a second or successive 28 U.S.C. 2254 petition in the district court, petitioner must first move this court for an order authorizing the district court to consider that petition. If petitioner files an application in this court for the authorization order, petitioner must show that:..... (SEE ORDER FOR FULL TEXT) The Clerk shall serve on petitioner with this order a copy of the unofficial form successive petition request. No motions for reconsideration, modification, or clarification of this order shall be filed or entertained. (Procedurally Terminated After Other Judicial Action; Certificate of Appealability. Edward LEAVY, Ferdinand F. FERNANDEZ) [02-15932] (ba)

2/27/03 District court casefile returned. 2 clerk's records. ups (sd)

3/11/03 Received original and 17 copies of Appellant Jason Dorton's petition for rehearing/rehearing en banc, exhibits "A" Through "D", 10 p.pages (Motion for Reconsideration); served on 3/11/03 (SEE 2/25/03 Order - Sent (17) copies back to counsel) [4678298] [02-15932] (ba)

APPENDIX 8

US Court of Appeals for the Ninth Circuit
Case Summary

Court of Appeals Docket #: 02-15821 Filed: 4/29/02
Nsuit: 3530 Habeas corpus (Fed)
Phelps v. People of the State, et al
Appeal from: Northern District of California (San Francisco)

Lower court information:
District: 0971-3 : CV-98-02002-MMC
presiding judge: Maxine M. Chesney, District Judge

8/27/02 Rcvd petitioner's supplementary memorandum of points and authorities in support of mtn for COA; served 08/21/02. [STAFF] [02-15821] (je)

11/26/02 District court casefile returned. 1 clerk's record. ups (sd)

12/2/02 Filed order (Stephen R. REINHARDT, Barry G. SILVERMAN) The request for a COA is granted with respect to the following issues: whether the DC erred in construing petitioner's motion to reinstate his 28 USC 2254 petition pursuant to FRCP 60(b)(5) as a successive application under 28 USC 2244(b). (see casefile for complete citations) The briefing schedule is set as follows: Appellant's opening brief is due 1/21/03; appellee's answering brief is due 2/24/03 and the optional reply brief is due 14 days from service of the answering brief. [02-15821] (ca)

1/15/03 Received Robert Beles for Appellant Kevin Phelps letter

dated 01/04/03 re: dkting of 02-15821 and 02-15932. [MOATT] [02-15821] (je)

1/21/03 Filed original and 15 copies Applt's opening brief (Informal: n) 14 pages and five excerpts of record in 1 volume; served on 1/21/03. [02-15821] (je)

2/12/03 Filed mtn of appellees' and order (Dep.Clk./cb): granting an ex.tm.f the answr br. The answr br is due March 26, 2003; optional reply br is due 14 days from srvc of the answr br. (Motion recvd 02/06/03) [02-15821] (je)

3/7/03 Filed order MOATT (HS) Petitioner's ltr dated Jan. 14, 2003 is contrued as a mtn to consolidate this appeal with appeal no. 02-15932 and is denied. The ct denied the request for a coa in appeal no. 02-15932. [02-15821] (je)

3/25/03 Filed original and 15 copies appellees' 28 page brief, 5 supplemental excerpts of record in 1 volume; served on 3/25/03. [02-15821] (je)

4/17/03 Filed mtn of applt and order (Dep.Clk./cb) granting an ex.tm in which to file the reply br. (cite) The reply br is now due May 16, 2003. (Motion recvd 04/15/03) [02-15821] (je)

5/9/03 Calendar check performed [02-15821] (mw)

APPENDIX 9

ROBERT J. BELES
ATTORNEY AT LAW
THE ORDWAY BUILDING
1 KAISER PLAZA, SUITE 1750
OAKLAND, CALIFORNIA 94612-3688
PHONE (510) 836-0100
FAX (510) 832-3690

Friday, December 6, 2002

Clerk
United States Court of Appeals
P.O. Box 193939
San Francisco, California 94119-3939

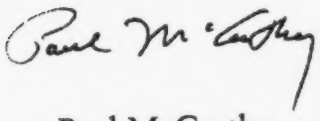
Dear Clerk:

This letter concerns two cases. The lower court numbers were C-98-02002 MMC (Phelps) and C-98-02003 MMC (Dorton). They were originally companion cases in the district court, filed on the same day, denial by the California Supreme Court on the same day. They involve the same issues concerning timeliness. The district court's order was appealed at the same time.

I have checked the dockets of these two cases (reprinted below). For some reason, the two cases have been assigned widely separated appeals numbers (02-15821 and 02-15932).

In Phelps, the Ninth Circuit has granted a certificate of appealability. In Dorton, there has been no action. It appears that the same action should be taken in Dorton as in Phelps since, on the issue appealed, the cases are essentially the same. I am mentioning this on the remote possibility that these two appeals may have been assigned to different staff and panels for review with possible inconsistent results occurring.

Sincerely,



Paul McCarthy

cc: Office of the Attorney General, attorney for respondents

APPENDIX 10

ROBERT J. BELES
ATTORNEY AT LAW
THE ORDWAY BUILDING
1 KAISER PLAZA, SUITE 1750
OAKLAND, CALIFORNIA 94612-3688
PHONE (510) 836-0100
FAX (510) 832-3690

Tuesday, January 14, 2003

Clerk
United States Court of Appeals
P.O. Box 193939
San Francisco, California 94119-3939

Dear Clerk:

This is a follow up to my letter of **December 6, 2002** concerning two cases.

The lower court numbers were C-98-02002 MMC (Phelps) and C-98-02003 MMC (Dorton). They were originally companion cases in the district court, filed on the same day, denial by the California Supreme Court on the same day. They involve the same issues concerning timeliness. The district court's order was appealed at the same time.

I have checked the dockets of these two cases (reprinted below). For some reason, the two cases have been assigned widely separated appeals numbers (02-15821 and 02-15932).

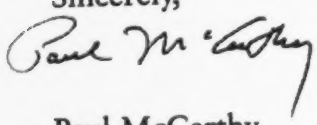
In Phelps, the Ninth Circuit has granted a certificate of appealability. The due date for the Opening Brief in Phelps is January 21, 2003, one week away. In Dorton, there has been no action. The last date on the Pacer log for Dorton is 8/27/02.

The log for Dorton does not indicate that the court received my letter of December 6, 2002.

It appears that the same action should be taken in Dorton as in

Phelps since, on the issue appealed, the cases are essentially the same. I am mentioning this on the remote possibility that these two appeals may have been assigned to different staff and panels for review with possible inconsistent results occurring.

Sincerely,



Paul McCarthy

cc: Office of the Attorney General, attorney for respondents